IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1692

VICTOR SOLOMON, SR.,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

LEO CATSONIS
205 Security Building
Charleston, WV 25301
Counsel for Petitioner

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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Petitioner, Victor Solomon, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in the case on February 1, 1979.

OPINION BELOW

There was no opinion rendered by the Supreme Court of Appeals of West Virginia in that the Court denied the petition for writ of error and supersedeas on two occasions by Orders entered on October 9, 1978, and on February 1, 1979, copies of which are set out in the Appendix at Appendix A, p. A-1 and Appendix B., p. B-1.

JURISDICTION

The last judgment Order of the Supreme Court of Appeals of West Virginia was entered on February 1, 1979, and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether a defendant in a state court criminal trial is denied rights afforded by the Fifth, Sixth and Fourteenth amendments when the trial does not comport with existing state case law and the defendant is denied a review thereof by virtue of an inadequate state appellate procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution; Sixth Amendment to the United States Constitution; Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This was a criminal proceeding upon an indictment for murder returned at the October, 1977, term of the circuit court of Monongalia County, West Virginia. The defendant entered a plea of "not guilty" on October 12, (R. 28), and filed a verified motion for change of venue on November 2. (R. 29). In the verified motion it was alleged, *inter alia*, that there was widespread hostility throughout Monongalia and surrounding counties, including specifically Marion County, to which motion the State filed an unverified answer (R. 30-34). A hearing was conducted on the motion on November 10, at which several witnesses testified, (R. 398-526), and several exhibits received, including a front page story carried in the Fairmont (Marion County) Times with a picture of the deceased. (R. 49). The defendant presented evidence of several witnesses concerning the radio coverage in Fairmont, (R. 431), the newspaper and television coverage in Fairmont, (R. 475), and the general hostile sentiment both in Monongalia and the surrounding counties. (R. 452).

[1]The parties will be referred to as the "State" and the "defendant"; page references will be to the record as prepared by the circuit clerk with stamped numerals (R.).

The court took the motion under advisement and on November 15, heard "argument" of counsel.[2] The following colloquy between defense counsel and the assistant prosecutor at the hearing is pertinent:

> (Assistant prosecutor)
> "I think, in our discussions, we did agree that probably Preston County and Marion County would be a little too close. I believe the four of us did come to that agreement." (R. 531).

In ruling on the motion the court noted that it had considered both Preston and Marion Counties but had ruled out Preston County because ". . . the newspapers from this county serve that area and I think that area would be in an identical position to this county . . ." and transferred the trial to Marion County. Ostensibly, this was based on ". . . matter of convenience" and the evidence of one witness at the hearing who lived in the Rivesville area ". . . that there could be a fair trial." (R. 531)

Trial commenced in Marion County on January 24, 1978, and the State introduced the testimony of the following witnesses.

[2]There was no argument, as such, since it was apparent that the motion would be granted and the location was the topic. (R. 529-532).

Beverly Selby, an assistant prosecutor of Monongalia County handling consumer protection matters, over objection, was permitted to testify that on September 5th or 6th she talked with a John Mould who complained that his motorcycle had been towed by defendant's company and that he felt that there had been an overcharge. (R. 536, 538-541). She advised him to take two witnesses when he retrieved his motorcycle because she knew from her own ". . . knowledge that Vic's usually didn't take checks . . ." and the witnesses could ". . . testify to . . . any conversations or any transactions that took place . . ." (R. 543).[3]

Phillip Randalls, a civilian employee at the State Police detachment, testified that he received two telephone calls from defendant requesting that an officer come to his garage because some boys were there and ". . . that there was going to be a fight . . .", (R. 548-549), and that thereafter another call was received that one of the boys had been shot. He understood that another call had been made, perhaps by defendant's wife (R. 557).

This witness was called by the State to elaborate upon his earlier testimony, (R. 561-570), and at the conclusion thereof the following transpired:

> "BENCH CONFERENCE: MR. FRAME: The defendant moves for a mistrial on the grounds that one James Moss, one of the jurors, is asleep and has been asleep for the past ten minutes, and we feel we are entitled to twelve jurors.
>
> "THE COURT: Deny the motion for a mistrial.
>
> "MR. FRAME: We would like for permission at some time in this trial to take evidence to prove

[3]The court overruled the objections of defendant, (R. 539-540), to the extensive hearsay testimony of this witness.

> that he has been asleep for ten minutes during what we think is important testimony.
>
> "THE COURT: How can you have testimony that someone is asleep?
>
> "MR. FRAME: His eyes were closed.
>
> "THE COURT: I don't know whether or not I am going to let you put on evidence." (R. 571).

However, the court requested the bailiff to instruct the juror that if he was asleep to ". . . make sure it doesn't happen again . . ." (R. 572).

Trooper Cueto took one of the calls from defendant and was advised that three boys were at his garage in Laurel Point and that he (defendant) was ". . . going to swear out warrants for them and he needed a State Trooper out here as soon as possible . . ." (R. 574). About five minutes later Cueto received another call from an unidentified male that ". . . there was a fight going on out at Vic's Garage and someone out there had a gun out." (R. 575-578). Troopers Clay and Morgan proceeded to Laurel Point (R. 576-579).

Richard Squires lives about a hundred yards from defendant and was sitting in his truck in his driveway and heard loud voices at the garage. (R. 581-584). He heard the defendant tell the three to get in the truck and leave and also heard three shots prior thereto. (R. 584-587).

Upon arrival, Troopers Morgan and Clay went to defendant's garage, (R. 619), then to his home and were met by the defendant. (R. 622). The defendant allegedly handed a gun to Trooper Clay, a .22 caliber pistol, (R. (679), which was admitted into evidence over defendant's objection as to the chain of custody. (R. 662).[4]

[4]The "chain of custody" issue required the testimony of five witnesses and the integrity was not fully established. (R. 621-663).

Trooper Clay then testified that he talked with defendant in the home and took a lengthy statement (R. 681), which was read to the jury verbatim (R. 686-692).[5]

Curt Smallhoover and John Mould, the two who accompanied the deceased, Charles King, to defendant's garage then testified for the State. Mould called King to use his pickup truck to retrieve his motorcycle, (R. 811), and the three went to defendant's garage (R. 817). Mould became very upset when the ignition parts came out with the key and began cursing at defendant. (R. 820). Defendant took the keys to the truck and started across the road to his home and King and Mould ran after him (R. 821, 822-846). A fight ensued and defendant returned the keys (R. 823-824). The three got the motorcycle out of the garage, loaded it onto the truck and defendant returned with a gun telling the three that he was calling the police. (R. 825). Defendant went inside and called the police, (R. 827) and the three were taunting and arguing with defendant (R. 823-834).[6] The defendant's hands were shaking and at one point the deceased lunged at the gun, (R. 834-854), and the gun fired (R. 836-855).

John Mould, the owner of the motorcycle, corroborated Smallhoover's testimony generally and admitted that he gave the defendant ". . . a little static . . ." when the ignition lock came out of its socket (R. 906). He confirmed that when the defendant removed the keys to King's truck and started toward his home with King in

[5]Although defense counsel did not object, no prior hearing was conducted on the admissibility, (R. 686); the statement was not signed by the defendant, (R. 35), and had been written and paraphrased by Clay. (R. 685-696).

[6]Smallhoover stated that the then defendant went inside, fired a shot, came out and got the license number, went back inside and fired another shot and came outside. (R. 827).

pursuit, the defendant was ". . . backing away from him . . ." (R. 911): that defendant just "smacked" King with his hand, (R. 913), and then gave the keys to King. (R. 916). He stated that the defendant went into his home and came running back with the gun stating:

> ". . . if it goes off it could hurt one of you guys or kill one of us, and it would be a mistake" (R. 924).

Mould admitted that the defendant had advised them that he had called the police, (R. 984), that there had been a fight between defendant and King, and that everyone, including defendant, was willing to wait until the police arrived to settle the matter (R. 986-987). He did not know exactly when the gun fired but only that it was after King lunged for the gun knocking he and the defendant to the ground (R. 994, 995-999).

At this point the State rested, (R. 1000), and the defendant moved for a directed verdict on the charge of murder in the first and second degree, (R. 1003), which was overruled (R. 1008).

The following day, prior to resumption of trial, the defendant moved for a mistrial on the following grounds:

> (1) That one of the jurors who had been seated for days was unable to attend due to weather conditions and was replaced by the alternate juror when a delay of one day would have permitted her attendance; that the regular juror was not ill or otherwise indisposed as contemplated by law, and,
>
> (2) That the prosecuting attorney had inadvertently taken a manilla envelope containing confidential defense material and read it (R. 1011-1013).

As to the first gound, the court denied the motion on the basis, *inter alia,* that another juror had been told previously that the trial would be completed by January 30 and would not interfere with a planned trip by the juror on that date and any delay would frustrate the completion by the 30th. (R. 1014). As to the second ground the court acknowledged "some concern" but rather than declare a mistrial requested counsel to furnish depositions as to the circumstances involved. (R. 1015).

The defendant's case commenced and Fred Ramsey testified that he was at defendant's service station on University Avenue when John Mould came after the motorcycle (R. 1033). Mould asked defendant's son, Victor, Jr., why the motorcycle was not there and was advised that after a week or so it had been taken to the other garage (R. 1034). Mould became incensed, used vulgar language and screamed at everyone present, including defendant's wife (R. 1035). Shortly thereafter Mould returned and began cursing again, paid the tow fee and refused an offer by Ramsey to take him to the garage to get his motorcycle. (R. 1037-1038).

Mrs. Solomon testified that the defendant was semi-retired with a seventy-five percent disability, had very little, if any, use of his left arm and extremely high blood pressure and therefore spent most of his time at the garage in Laurel Point. (R. 1049-1052). She stated Mould had called several times about the motorcycle but would not come to get it. (R. 1053). She confirmed that they had offered to take Mould out to the garage to get his motorcycle but that Mould replied that he ". . . had his friends to get his bike."[7] She then called the

[7]This was obviously as a result of the advice the assistant prosecutor had given him to take two "witnesses." (R. 543).

defendant at the garage and the defendant said that he ". . . would be glad to give him the bike." (R. 1056-1057). The defendant had had nothing to do with the towing of the motorcycle and it had been taken to the garage due to lack of space at the downtown station (R. 1057). Later, defendant called the station and talked with his daughter Cindy who, in turn, informed Mrs. Solomon that her daddy had been beaten up and wanted Mrs. Solomon to call the State Police, which she did. (R. 1058).

Mrs. Solomon waited ten or fifteen minutes and not having heard a call on the police monitor called the State police again and was told that the defendant was also calling on another line for help (R. 1059-1060). About fifteen minutes later Mrs. Solomon heard on the police monitor that the defendant had called for an ambulance. (R. 1060). When Mrs. Solomon arrived at the scene the defendant was ". . . all beat up . . ." and was in the house with Trooper Clay. (R. 1062). The defendant had already talked with Trooper Clay when she arrived but the version of what defendant had told Clay was different with what Clay wrote. (R. 1062). Cindy Solomon, the defendant's daughter, had gone by the station after work and answered the telephone when defendant called requesting that the State Police be called. He stated that he had tried to call but couldn't get through and, during the course of the conversation she heard shouting in the background and the defendant telling the ". . . boys to keep away . . ." and ". . . why don't you guys just get out of here . . ." (R. 1075-1076). The defendant sounded breathless on the telephone, and when she saw him later at the State Police barracks he had cuts and bruises, a huge knot on his head and his clothes were badly torn (R. 1076-1077).

The defendant, age fifty-five, had been in the garage business since graduation from high school and spent his time at the garage and looking after some rental units in Laurel Point. (R. 1090-1093). After his wife called to inform him that Mould was coming for the motorcycle and the arrival of Mould, he went to the garage and helped the three in getting the motorcycle (R.1096-1097). Suddenly, Mould started cursing and defendant got a little upset so he thought he had better leave. (R. 1097-1098). It did not appear to the defendant that any effort was being made to take the motorcycle but that the three ". . . just acted like they wanted to cuss and start trouble . . ." so he closed the garage doors and started across the road to his home. As he passed the pickup truck the door was open and he took the ignition keys so he could telephone the police to handle it. (R. 1098-1099).

Before he reached the steps to his home King jumped on his back and shoved him out into the road and started fighting with him; he tried to get away but Mould and King pulled him down the steps and began hitting him. (R. 1100-1101). He told them that it was not right for someone to jump on people on their own property and that all they had to do was ask for their keys. (R. 1101-1101). The defendant's cuts and bruises on the knees and elbows occurred when he was dragged down the stone steps. (R. 1102).

Defendant went into his home and tried to call the Sheriff's office and State Police but was unsuccessful. (R. 1103). He went outside and heard a lot of noise down at the garage and, apparently not knowing whether the three were taking some of his property, got a pistol and returned to the garage. (R. 1104). When the three saw him they began yelling and defendant went inside the garage

and called the station and talked with Cindy. (R. 1105-1106). Out of an abundance of caution the defendant himself called the State Police from the garage and after he hung up the three were yelling and he was waiting for them to "cool down" a little. (R. 1109). He told them that the police were on the way and would settle it; Mould inquired if defendant would shoot them if they decided not to wait and defendant replied "no". (R. 1109-1110).

King began asking defendant to shoot something to prove that the gun was not loaded with blanks and began circling around to the rear of the defendant. Defendant asked him to get back into the truck and King began cursing him and stated that he (King) was going to ". . . wrap that gun . . ." around defendant's neck. (R. 1110). Mould began yelling at defendant again and King resumed trying to get behind the defendant; defendant again asked King to get into the truck and leave. (R. 1111-1112). King began laughing at defendant because the gun was shaking and defendant told him he was going to leave at which time King lunged against defendant. (R. 1112-1113). King grabbed the gun and propelled he and defendant into a door and onto the floor of the garage. (R. 1115).

Defendant did not know at what point after King lunged at him and they fell into the garage that the gun discharged but it was not intentional. (R. 1116). He did not know how the gun was discharged or which one of them struck the trigger or the hammer (R. 1117).

Defendant went straight to the phone and called the police and asked for an ambulance. (R. 1120). He suggested to Mould and Smallhoover that they take the

motorcycle out of the pickup and take King to the hospital in it and Mould disagreed. (R. 1121).

The defense rested. (R. 1182), and the court charged the jury, (R. 1188-1204), the State offering thirty six instructions and the defendant seventeen.

During closing argument defense counsel objected to the prosecutor expressing a personal opinion as to the guilt of the defendant and the objection was overruled (R. 1291).[8] After the jury retired to deliberate, it requested to know the penalty for voluntary manslaughter and after being informed by the court, (R. 1331), later requested that the charge be re-read, which was done. The jury then returned a verdict of guilty of voluntary manslaughter. (R. 1332).

Thereafter defendant filed a motion to set aside the verdict and grant a new trial which included an affidavit of the defendant asserting that the six defense witnesses who could not attend and testify because of the weather were material witnesses, (R. 294-302), which motion was denied by order entered on February 22, 1978. (R. 325). A stay of execution was granted until June 25, 1978, which was extended until July 24, 1978. (R. 395-396).

On July 24, 1978, a petition for writ of error and supersedeas was presented to the West Virginia Supreme Court and refused by Order entered on October 9, 1979.[9] Thereafter, on January 9, 1979, another petition for writ

[8]The statement was that ". . . it is my firm belief that we have proven to you beyond all reasonable doubt." Defense counsel requested a curative instruction to which the court responded that he saw ". . . nothing wrong with that argument under the circumstances." Prosecutor then continued that ". . . I feel we have proved that Victor Solomon committed murder in the first degree against Chuck King that day." (R. 1291).

[9]A copy of this Order is set out in the Appendix at Appendix A, page A-1.

of error and supersedeas was presented to that Court and similarly refused by Order entered on February 1, 1979.[10]

REASON FOR GRANTING THE WRIT

The numerous pre-trial and trial errors attending this proceeding[11] were presented to the West Virginia Court on two occasions and summarily rejected without comment. The basic unfairness of the Court's action and the appellate procedure in West Virginia is demonstrated by the seemingly absurd conclusion which must be drawn by such action.

In the petition and brief submitted to the West Virginia Court it was pointed out that the most ". . . patent error in the instant case occurred in the admission of the 'statement' of the defendant into evidence without a prior hearing out of the presence of the jury as to its voluntariness."[12]

It was pointed out that at the trial Trooper Clay testified that after arriving at the home of defendant he advised defendant of his rights and took a "lengthy statement" from him. (R. 681). He stated that defendant became upset only when ". . . you started discussing this incident . . ." and if he (Clay) would not have said anything he didn't believe the defendant ". . . would have said anything." (R. 682). The State then asked Trooper Clay to read the statement to the jury and, without objection, the statement was read to the jury in its entirety. (R. 686-692).

[10]A copy of this Order is set out in the Appendix at Appendix B, page B-1.

[11]These commenced with a motion for a change of venue before trial and continued throughout the trial with examples such as sleeping jurors, (R. 751), prosecutorial misconduct (R. 1014), etc.

[12]Note of Argument in Support of the Petition for Writ of Error and Supersedeas, pages 19-21.

It was further pointed out to the Court that in *State* v. *Fortner,* 150 W.Va. 571, 148 S.E. 2d 669 (1966), it had laid down the unequivocal rule that:

> ". . . it is the mandatory duty of the trial court whether requested or not, to hear the evidence and determine in the first instance, out of the presence of the jury, the voluntariness of an oral or written confession by an accused person prior to admitting the same into evidence, and it is reversible error to fail to follow this procedure . . ."

It was further pointed out that if any question existed as to the application of this principle it was resolved in *Arthur* v. *McKenzie,* 245 S.E. 2d 852, decided by the West Virginia Court on July 11, 1978. There the petitioner had been convicted of first degree murder and an appeal had been denied. A habeas corpus proceeding was instituted in the West Virginia Court and made returnable in the circuit court. After a hearing the writ was denied and an appeal was taken to the West Virginia Supreme Court on the admission of two incriminating statements, one signed and one unsigned, without an *in camera* hearing to test whether they had been voluntarily given.

There, as here, the record did not show a request for a hearing and, in fact, when one of the statements was proposed to be read, petitioner's attorney stated that they had no objection and the defendant personally stated "Put it in the record, Your Honor."[13]

The West Virginia Court, is granting the relief *via* an extremely brief opinion, reiterated the rule set out in *Fortner, supra,* and held that:

[13]The question of "waiver" was not raised in the *Arthur* appeal but it appears that *Wainwright* v. *Sykes,* 97 S.Ct. 2497 (1977), had no bearing since there Florida law required a motion to suppress prior to trial and the point was not raised on appeal.

> "In camera hearing is constitutionally required about the voluntariness of *any* statements made by defendants, intended to be placed in evidence . . ." (Court's Emphasis).

The Court also cited *State* v. *Smith,* .....W.Va.....,, 212 S.E. 2d 759 (1975), and *Spaulding* v. *Warden,* ..... W.Va....., 212 S.E. 2d 619 (1975), and in a footnote pointed out that in *Spaulding* it was stated that ". . . This rule of constitutional law is so well established that it calls for little discussion."

Here, the "statement" was used extensively by the State both in its case in chief, in cross-examination of the defendant and in closing argument.[14] In fact, the "statement" was probably decisive of the issue of at least a voluntary or involuntary manslaughter verdict notwithstanding that there was an abundance of evidence on the question of admissibility. For example, defendant stated that Clay gave him his "rights" *after* the statement was made, (R. 1136), the "paraphrased" statement was not what defendant told Clay, (e.g., R. 1062, 1136), the statement was not signed, (R. 43), and the "waiver of rights" form Clay had defendant sign indicated that defendant had counsel to represent him. (R. 5).

Accordingly, it is clear that the defendant was denied rights afforded him under the State and Federal Constitutions in the admission of the "statement" but by virtue of the West Virginia appellate procedure defendant will be remediless.[15]

This is true because no appeal as a matter of right

[14]At one point the prosecutor told the jury that they heard the defendant on the stand ". . . try to talk his way out of that statement that he gave within minutes after the killing." (R. 1274).

[15]It is interesting to note that on second application the author of the *Arthur* case, Justice Harshbarger, voted to grant the petition. (Appendix B, page B-1).

exists in the State of West Virginia. Every state with the exception of West Virginia and Virginia provides for an appeal to either an intermediate appellate court or to the highest appellate court in the state as a right.

In West Virginia, statutory procedures require an application for appeal by means of an *ex parte* petition for a writ of error. The Supreme Court of Appeals, in its discretion, then determines whether there should be a full review of the case with presentation and arguments by both parties in the event the appeal is granted. A denial of the petition for writ of error is executed by entry of a brief order reciting such denial. Thus, no opinion, memorandum or other comment is available to an unsuccessful appellant-petitioner for possible future clarification in a petition for rehearing. A review of appellate procedures in other states reveals that those citizens, via state constitutions or statutory provisions, are entitled to a full appellate review upon briefs and argument of counsel for both parties as a matter of right.[16]

Chapter 58, Article 5, *et seq.*, West Virginia Code, 1931, as amended, are the applicable statutory sections dealing with appellate relief in the Supreme Court of Appeals of West Virginia. West Virginia Code 58-5-1, 1931, as amended, in pertinent part, provides:

> "A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases: . . . (j) In any criminal case where there has been a conviction in a circuit court or a conviction in an inferior court which has been affirmed in a circuit court.
>
> * * * *

[16]West Virginia and Virginia are the only two states which presently require *applications* for appellate review as opposed to an appeal as a matter of right. The State Codes and Constitutions of these two states are very similar due to the fact that West Virginia, upon entry to the Union in 1863, was formerly a part of the State of Virginia and adopted various constitutional provisions, statutes and procedures from the existing body of Virginia law. See also, Judicature, "Is the Right of Appeal Protected By the Fourteenth Amendment?," Vol. 54, No. 7, February, 1971.

There are no intermediate appellate courts in West Virginia and an application for appeal from a circuit court judgment must be taken according to the procedures set forth in West Virginia Code, 58-5 *et seq.*[17]

In addition, West Virginia Code, 58-5-3, provides:

> "Any person who is a party to such controversy, wishing to obtain a writ of error, appeal or supersedeas in the cases named in the first section [§58-5-1] of this article, may present a petition therefor to the supreme court of appeals, or to a judge thereof in vacation, which petition shall assign errors.

West Virginia Code, 58-5-4, specifies that an application for appeal must be filed within eight months after the entry of the judgment order in the circuit court. This time limit is mandatory and jurisdictional and a failure to comply is fatal. *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966).[18]

To a degree, West Virginia appellate relief can be compared with relief in this Court in that no appeal lies as a right. A case presented in this Court, either on appeal

[17]Civil and Criminal appellate procedure is basically the same in West Virginia. An appeal of a conviction must also begin with an application for appeal by petition for a writ of error and supersedeas.

[18]This has been the general rule in West Virginia since 1885 when the West Virginia Supreme Court so held in the case of *Lloyd* v. *Kyle*, 26 W. Va. 534 (1885). See also, *Sothen* v. *Continental Assurance Co.*, 147 W. Va. 458, 128 S. E. 2d 458 (1962); *State ex rel Davis* v. *Boles*, 151 W. Va. 221, 151 S. E. 2d 110 (1966).

or certiorari, can be denied without opinion or further argument.[19] It is apparent that such a procedure at the state level, where the first avenues of appellate relief should be clear and unrestricted, is manifestly unjust. The method presently in operation in West Virginia denies an aggrieved appellant the proper review and consideration contemplated by the dictates of fundamental fairness, due process and equal protection.

Although no statutory provision expressly states that there is no right to an appeal in West Virginia, the West Virginia Supreme Court of appeals has consistently held that the provisions of Chapter 58, Article 5, *et seq.*, do not provide an appeal as a matter of right even in criminal cases.[20] In *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966), a criminal appeal, the West Virginia Supreme Court of appeals held:

> "One convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error . . . There is no absolute right in a suitor to have a decision against him reviewed . . ."

It is apparent from the foregoing that an appellant in West Virginia is not afforded the same rights and privileges as appellants in other states. The petitioner herein was effectively denied a full appellate review without reason or explanation. There were valid asser-

[19]Unlike West Virginia, however, there is a review as a matter of right to the Circuit Courts of Appeals in the federal system which provides an effective review. With variations, this is the appellate procedure adopted in all but two of the States.

[20]West Virginia Code, 58-5-10, 1931, as amended, provides: "The court or judge to whom a petition is duly presented, if of the opinion that the decision complained of ought to be reviewed, may allow an appeal . . ." Certainly implicit in this provision is the discretionary nature of the granting of an appeal; however, no provision in the Code expressly denies the right to appeal. The statutory procedure and cases interpreting that procedure speak for themselves.

tions of constitutional as well as other errors at the trial court level raised by petitioner in his application for appeal below and such claims of error should not be cast aside summarily without full review and hearing.[21]

Petitioner has been denied his constitutionally protected right to due process of the law and has been denied equal protection of the laws. Petitioner is penalized for residing in one of the only two jurisdictions in the country which do not make the appellate review procedure available as a right. The Fourteenth Amendment to the United States Constitution can clearly be viewed as protecting the right to appeal for all citizens of the United States.

Appellate review and the right to be heard upon appeal without unreasoned restrictions have been the subject of many cases in this Court. *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966), was a criminal appeal involving a prisoner's right to a transcript upon appeal. Rinaldi was proceeding in *forma pauperis* and could not afford the transcript required by New Jersey statutes. In reversing, this Court, per Justice Stewart, held:

> "This Court has never held that the States are required to establish avenues of appellate review, but *it is now fundamental that, once established these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts . . .*" (Emphasis Supplied).[22]

[21]Although Rules of Practice in the Supreme Court of Appeals of West Virginia allow a maximum 10 minutes oral presentation of the application for appeal, for all practical purposes there is not sufficient time to argue the various legal issues raised upon the application and the merits of the case are rarely gone into at depth. The only meaningful treatment of legal questions is in appellant's brief.

[22]There have been many "right to transcript" cases ruled upon both in this Court and in the various federal and state appellate courts. These cases are cited primarily to amplify the logic which underlies all decisions which afford appellate tools to indigents and others, i.e., the sanctity of the appeal itself.

Another case dealing with the furnishing of a transcript is *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), wherein, at page 193 of the United States Report, this Court readopted the rule in *Rinaldi* saying:

> ". . . avenues of appellate review must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . . Therefore, in all cases the duty of the State is to provide the indigent as adequate and effective with funds . . ."

In West Virginia not only indigents but *every* aggrieved party seeking an appeal are shackled by the same unreasoned distinctions and restrictions.

The case of *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), similarly upheld the appellant's right to a transcript. The review as set forth in *Rinaldi* v. *Yeager*, 384 U. S. 305. *supra*, was followed and this Court also noted:

> "Although the Oklahoma statutes expressly provide that 'an appeal to the Court of Criminal Appeals may be taken by the defendant as a matter of right . . .' the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner . . . This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make . . ."

The instant case would perhaps be different if West Virginia was only one of many states which deny a civil or criminal appeal as a matter of right. However, the language used by this Court in the foregoing cases indicates the gravity and importance of an unrestricted appellate process. Indeed, the Constitution intended to protect civil property rights as well as life and liberty.

As noted in the Judicature article above[23] the Model Judicial Article proposed by the American Bar Association recommends that a defendant shall have an absolute right to one appeal in all criminal cases.

Petitioner is asserting a right afforded the vast majority of citizens in this country. Whether a new and more approachable appellate system in West Virginia should result from this case is for this Court to decide upon the basis of its determination of the federally protected constitutional rights claimed herein. The system in West Virginia as it now stands violates fundamental fairness and equal protection in that the majority of appellants in this state possess rights without remedies.[24] Petitioner has no remedy at this time save the relief sought in this Court; had petitioner resided in any other state his appeal would have been properly heard long ago.

CONCLUSION

For the foregoing reasons it is resepctfully submitted that a writ of certiorari should issue to review the order of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

LEO CATSONIS
205 Security Building
Charleston, WV 25301
Counsel for Petitioner

[23]See foot note 15, *ante*.
[24]See 87 A.B.A. Rep. 391-399 (1962).

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of October, 1978, the following order was made and entered, to-wit:

State of West Virginia

vs.

Victor Solomon, Sr.

On a former day, to-wit, July 24, 1978, came the petitioner, Victor Solomon, Sr., by Catsonis and Linkous, Leo Catsonis and Thomas L. Linkous, his attorneys, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Marion County rendered in this case on the 17th day of July, 1978, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error and supersedeas prayed for is refused.

A True Copy

Attest: .....

Clerk Supreme Court of Appeals

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 1st day of February, 1979, the following order was made and entered, to-wit:

State of West Virginia

vs.

Victor Solomon, Sr.

On a former day, to-wit, January 9, 1979, came again the petitioner, Victor Solomon, Sr., by Catsonis & Linkous and Leo Catsonis and Thomas L. Linkous, his attorneys, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Marion County rendered in this case on the 17th day of July, 1978, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected the writ of error and supersedeas prayed for is refused by a majority of the Court on this second application. Justice Harshbarger would grant.

A True Copy

Attest: .....

Clerk Supreme Court of Appeals

APPENDIX C

West Virginia Code, Ch. 58, Art. 5, sec. 1

§58-5-1. When appeal or writ or errors lies.

A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases: (a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or the amount in controversy, exclusive of costs, exceeds one hundred dollars.

West Virginia Code, Ch. 58, Art. 5, sec. 3

§58-5-3. Presentation of petition assigning errors.

Any person who is a party to such controversy, wishing to obtain a writ of error, appeal or supersedeas in the cases named in the first section [§58-5-1] of this article, may present a petition therefor to the supreme court of appeals, or to a judge thereof in vacation, which petition shall assign errors.

West Virginia Code, Ch. 58, Art. 5, sec. 4

§58-5-4. Time for appeal or writ of error; notice of intent to file petition in criminal cases to be filed with clerk stating grounds.

No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented: Provided, that the judge of the circuit court may, prior to the expiration of such period of eight months, by order entered of record

extend and reextend such period for such additional period or periods, not to exceed a total extension of four months, as in his opinion may be necessary for preparation of the transcript, if the request for such transcript was made by the party seeking such judicial review within sixty days of the entry of such judgment, decree or order. Such judge may also extend and reextend such period for such additional period or periods of time not to exceed a total extension of four months, upon petition made prior to the expiration of the initial eight month period for good cause shown and if the request for such transcript was made by the party seeking such judicial review within sixty days of the entry of such judgment, decree or order.

In criminal cases no petition for appeal or writ of error shall be presented unless a notice of intent to file such petition shall have been filed with the clerk of the court in which the judgment or order was entered within sixty days after such judgment or order was entered. The notice shall fairly state the grounds for the petition without restricting the right to assign additional grounds in the petition.

West Virginia Code, Ch. 58, Art. 5, sec. 9

§58-5-9. Rejection of petition; presentation of petition to court after rejection by judge in vacation.

In a case wherein the court shall deem the judgment, decree or order complained of plainly right, and reject it on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a judge in vacation shall not prevent the presentation of such petition to the court when in session.

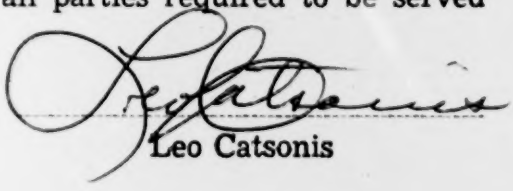
West Virginia Code, Ch. 58, Art. 5, sec. 10

§58-5-10. Allowance of appeal or writ of error or supersedeas; stay of proceedings.

The court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part.

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of counsel for the petitioner and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 30th day of April, 1979, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondent by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Andrew G. Fusco, Prosecuting Attorney, Monongalia County Courthouse, Morgantown, West Virginia 26505. I further certify that all parties required to be served have been served.



Leo Catsonis